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### BANKRUPTCY DEBTORS NOW MUST LIST ALL DEBTS IN ORDER TO OBTAIN A DISCHARGE OF THOSE DEBTS

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What obligations does a bankruptcy discharge cover? During the past 20 years, the common practice among consumer bankruptcy attorneys has been to assure debtors in “no asset” bankruptcy cases – cases in which there are no non-exempt assets available for distribution to creditors – that even if the debtor failed to list a creditor on his or her schedules, the obligation still would be discharged. This practice arose from a “no harm, no foul” reading of Bankruptcy Code Section 523, even though Section 523(a)(3)(A) of the Bankruptcy Code provides that a debt will not be discharged if the individual debtor is not listed or scheduled during the bankruptcy case in time for the creditor to file a proof of claim or participate in the bankruptcy proceeding.

Federal Bankruptcy Rule 2002 permits a Bankruptcy Court in “no asset” cases to choose not to fix a bar date in which proofs of claim must be filed. Thus, Courts adopting the “no harm, no foul” reasoning found that there was no date in which to “timely file” the proof of claim and therefore no triggering of Bankruptcy Code Section 523(a)(3)(A). See, e.g., In re Beezley, 994 F.2d 1433, 1435-37 (9<sup>th</sup> Cir. 1993); In re Thibodeau, 136 B.R. 7 (Bankr. D. Mass. 1992).

Recently, however, in Colonial Surety Co. v. Weizman, 564 F.3d 526 (1<sup>st</sup> Cir. 2009), the First Circuit Court of Appeals rejected this reasoning, and held that even in a “no asset” case, if a debt or claim is not scheduled then the debt is not discharged absent a reopening of the bankruptcy. The facts are as follows. In 2005, Avi Weizman agreed to indemnify Colonial Surety Co. on certain bonded contracting jobs. In 2006, Mr. Weizman filed a “no asset” Chapter 7 bankruptcy case, failed to list Colonial Surety as a contingent creditor, and received his discharge, following which his case was closed. Later in 2006, Colonial Surety paid certain bonded claims and sought indemnification from Weizman and others. Although Weizman moved to reopen his bankruptcy case to list Colonial Surety, he later withdrew that request (likely out of fear that someone would allege that he fraudulently concealed assets). Weizman then pressed his defense that, even though

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**The lesson to learn from Weizman is to include every possible claim on bankruptcy schedules. There is no adverse consequence to listing a disputed claim in a bankruptcy even if it turns out that the debtor really does not owe anything to the listed creditors.**

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Colonial Surety was not listed as a creditor, the debt was still discharged.

The District Court held, and the First Circuit affirmed, that the obligation to Colonial Surety was not discharged. First, the Appeals Court held that the contingent indemnity claims were “claims” within the meaning of Bankruptcy Code Section 101(5). Second, the Court stated that the general rule is that if a “debtor fails to list a supposed creditor’s claim – meaning that the creditor will not be notified of the opportunity to participate in the proceeding (and the creditor does not otherwise happen to know of the bankruptcy), the debt is not discharged.” Weizman, 564 F.3d at 561.

The Court’s reasoning was founded upon the equities of the situation. Providing notice, even in a “no asset” case, allows creditors to participate in the case and to argue that there may be assets available. An honest debtor can still have the debt discharged if he or she asks the Bankruptcy Court to reopen the case to list the creditor who was innocently omitted and who would have received no benefit from the initial notice. This properly leaves the burden squarely on the debtor’s shoulders to disclose the debt or to explain why it was innocently omitted.

The lesson to learn from Weizman is to include every possible claim on bankruptcy schedules. There is no adverse consequence to listing a disputed claim in a bankruptcy even if it turns out that the debtor really does not owe anything to the listed creditors. Claims that are innocently omitted from the schedules may later be discharged, but only after the debtor pays to reopen the case and only provided that the debtor can prove his innocence of omission in the re-opened bankruptcy case.

*To discuss your situation, and to learn how Looney & Grossman may be able to assist you, please contact Pamela A. Harbeson, Esq. at (617) 951-2800 or [pharbeson@lgllp.com](mailto:pharbeson@lgllp.com).*